

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF ECONOMIC SECURITY

In the Matter of Proposed Adoption
of Amended Rules of the State
Department of Economic Security
Governing Vocational Rehabilitation
Services, Minnesota Rules, Parts
3300.5010 to 3300.5060.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on April 19, 1995, at 9:00 a.m. in Room 502, IRS Training Center, Galtier Plaza, 175 East Fifth Street, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. § 14.131 to 14.20, to hear public comment, determine whether the Minnesota Department of Economic Security ("the Department") has fulfilled all relevant substantive and procedural requirements of law or rule applicable to the adoption of the rules, evaluate whether the proposed rules are needed and reasonable, and assess whether or not modifications to the rules proposed by the Department after initial publication are substantially different from the rules as originally proposed.

Donald E. Notvik, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Kim Rezek, Director of Vocational Rehabilitation; Cathy Carlson, Manager of Program Planning and Development; Roberta Pisa, Manager of Consumer Services, and Andrew Beisner, Rehabilitation Specialist. Approximately twenty-eight persons attended the hearing. Seventeen persons signed the hearing register. The Administrative Law Judge received fifteen agency exhibits and two public exhibits during the hearing. The hearing continued until all interested persons, groups, and associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until May 9, 1995, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on May 16, 1995, the rulemaking record closed for all purposes.

This Report must be available for review by all affected individuals upon request for at least five working days before the Department takes any further action on the rules. The Department may then adopt final rules or modify or withdraw its proposed rules. If the Department makes changes in the rules other than those recommended in this report, it must submit the rules with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of final rules, the agency must submit the rules to the Revisor of Statutes for a review of the form of the rules.

When the Department files the rules with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On October 3, 1994, the Department published a Notice of Solicitation of Outside Opinion regarding its proposal to adopt rules pertaining to vocational rehabilitation services. 19 State Register 740 (Oct. 3, 1994). The Department received several comments in response to the Notice of Solicitation. (Agency Exs. 6-7.)

2. On January 30, 1995, the Department filed the following documents with the Chief Administrative Law Judge:

- a. a copy of the proposed rules certified by the Revisor of Statutes;
- b. the Order for Hearing;
- c. the Notice of Hearing proposed to be issued;
- d. the Statement of Need and Reasonableness ("SONAR"); and
- e. a statement by the Department of the anticipated attendance at the hearing, if held.

(Agency Exs. 1-3.)

3. On February 16, 1995, the Department mailed the Notice of Hearing and a copy of the proposed rules to all persons and associations who had registered their names

with the Department for the purpose of receiving such notice and to other persons to whom additional discretionary notice was given by the Department. (Agency Ex. 5.)

4. On February 21, 1995, the Department published the Notice of Hearing and the proposed rules at 19 State Register 1767. (Agency Ex. 9.)

5. In response to the published notice and the mailing, the Department received over 25 requests from persons for a hearing on the proposed rules. (Agency Ex. 4.)

6. On March 27, 1995, the Department filed the following documents with the Administrative Law Judge:

- a. a photocopy of the pages of the State Register containing the Notice of Hearing and the proposed rules (Agency Ex. 9);
- b. the Notice of Hearing as mailed (Agency Ex. 5);
- c. the Department's certification that its mailing list was accurate and complete as of February 15, and the Affidavit of Mailing the Notice to all persons on the Department's mailing list (Agency Ex. 5);
 - d. the Affidavit of Mailing the Notice to those persons to whom the Board gave discretionary notice (Agency Ex. 5);
 - e. a copy of the Notice of Solicitation of Outside Opinion published on October 3, 1994, and copies of all materials received in response to the Notice of Solicitation (Agency Exs. 6-7); and
 - f. the names of Agency personnel or others solicited by the Agency to appear (Agency Ex. 8).

7. Minn. Stat. § 14.14, subd. 1a (1992), requires that “[e]ach agency maintain a list of all persons who have registered with the agency for the purpose of receiving notice of rule hearings.” Minnesota Rules pt. 1400.0600 (1993) requires that the agency file an affidavit that it mailed the notice of hearing to all persons on the list maintained by the agency and a certification that the mailing list which was used for the hearing was accurate and complete. In this instance, the Department’s Affidavit of Mailing indicates that it mailed the notice of hearing on February 16, 1995, but its Certification attests that the list used was accurate and complete as of February 15, 1995. The statute and rule clearly contemplate that the list will be certified as accurate and complete as of the same date the notice was mailed. The Department's failure to comply strictly with the rules constituted a procedural error. In City of Minneapolis v. Wurtele, 291 N.W.2d 386, 391 (Minn. 1980), however, the Minnesota Supreme Court noted that “[t]echnical defects in compliance which do not reflect bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be protected by the procedures will not suffice to overturn governmental action.” See also Auerbach, Administrative Rulemaking in Minnesota, 63 Minn. L. Rev. 151, 215 (1979)(in deciding if an error is

fatal, one should consider (1) the extent of the deviation, (2) whether the error was inadvertent or intentional, and (3) the extent to which noncompliance prevented people from participating in the rulemaking process). Accord: Report of the Administrative Law Judge in In re Proposed Amendments to the Rules of the State Board of Animal Health, OAH Docket No. 2-0500-4574-1 (June 28, 1990); but cf. Johnson Bros. Wholesale Liquor Co. v. Novak, 295 N.W.2d 238, 241-42 (Minn. 1980) (a complete failure to comply with the Administrative Procedure Act is not an appropriate instance in which to apply the substantial compliance doctrine and results in an invalid rule).

8. The Legislature amended the Minnesota Administrative Procedure Act in 1992 to include a harmless error provision. See Minn. Stat. §14.15, subd. 5. Pursuant to that enactment, the Administrative Law Judge must "disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule" if the Judge determines that (1) the agency's error "did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process" or (2) "the agency has taken corrective action to cure the error or defect" so that interested parties were not deprived of meaningful participation in the rulemaking process.

9. The Department's error in this proceeding related only to the procedural requirements of this rulemaking proceeding and not to the substantive aspects of the proposed rules. There was only a one-day discrepancy between the date of certification and the date of mailing. There is no evidence that anyone in fact was added to the list maintained by the agency on February 16, 1995, and thereby failed to receive notice of the rulemaking proceeding. No one objected to the Department's failure to certify that its mailing list was accurate and complete on the date the notice of hearing was mailed or complained of any prejudice arising from the Department's failure to comply strictly with Minn. Stat. § 14.14, subd. 1a (1992), and Minnesota Rules pt. 1400.0600 (1993). Numerous individuals and organizations participated in this rulemaking proceeding, and that participation was vigorous. Under these circumstances, the Administrative Law Judge finds that the agency's error "did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process" within the meaning of Minn. Stat. § 14.15, subd. 5 (1992) and that the procedural error thus must be disregarded as harmless in nature.

Nature of the Proposed Rules and Statutory Authority

10. The proposed rules eliminate the requirement in the current rules that consumers participate financially in the cost of sign language interpreter services and other auxiliary aids and services and indicate that sign language interpreters and other auxiliary aids and services must be provided by public bodies rather than by the Department. The proposed rules also clarify the circumstances under which the Department may provide transportation services, specify the types of services the Department may provide to assist in the establishment of a small business, explain that

the Department will purchase only new equipment with respect to vehicle adaptations, modify the cap on payments for post-secondary tuition and fees for two-year programs and for two particular entities (Gallaudet University and the National Technical Institute for the Deaf), specify that vehicle adaptations are considered rehabilitation technology, and ensure that consumers have a free choice of vendors for mental health services.

11. The Department is required by state law to administer programs providing vocational rehabilitation services. See Minnesota Statutes, Chapter 268A (1992). Minn. Stat. § 268A.03(b) (1992) directs the Commissioner to "provide vocational rehabilitation services to persons with disabilities in accordance with the state plan for vocational rehabilitation," including but not limited to the following services:

diagnostic and related services incidental to determination of eligibility for services to be provided . . . ; vocational counseling, training and instruction . . . ; physical restoration . . . ; transportation; occupational and business licenses or permits, customary tools and equipment; maintenance; books, supplies, and training materials; initial stocks and supplies; placement; on-the-job skill training and time-limited postemployment services leading to supported employment; acquisition of vending stands or other equipment; initial stocks and supplies for small business enterprises; supervision and management of small business enterprises, merchandising programs, or services rendered by severely disabled persons.

12. Minn. Stat. § 268A.03(m) (1992) provides that the Commissioner of Economic Security shall "adopt, amend, suspend, or repeal rules necessary to implement or make specific programs that the commissioner by sections 268A.01 to 268A.10 is empowered to administer." The Commissioner is also authorized by Minn. Stat. § 268.021 (1992) to "adopt rules . . . in accordance with chapter 14, with respect to programs the commissioner administers under this chapter and other programs for which the commissioner is responsible under federal or state law." The Judge concludes that the Department has general statutory authority to adopt these rules.

Small Business Considerations in Rulemaking

13. Minn. Stat. § 14.115, subd. 2 (1992), requires state agencies proposing rules that may affect small businesses to consider methods for reducing adverse impact on those businesses. In its Notice of Hearing, the Department indicated that it had determined that the proposed rules do not affect small businesses within the meaning of Minn. Stat. § 14.115. The Department also encouraged anyone disagreeing with this conclusion to comment. No one has suggested that the rules proposed by the Department will adversely affect existing small businesses. Some suggestion has been made that the Department has an obligation to provide greater assistance to eligible consumers in order to help them establish a small business under their individualized

written rehabilitation program. The fact that these rules may not encourage the development of small businesses to as great an extent as some commentators desire does not mean that the proposed rules have an adverse impact on small businesses. The proposed rules do not institute compliance or reporting requirements, design or operational standards, or other requires that have an adverse impact on small businesses within the meaning of the statute. The Administrative Law Judge thus finds that the Department has complied with Minn. Stat. § 14.115, subd. 2 (1992).

Fiscal Notice

14. Minn. Stat. § 14.11, subd. 1 (1993), requires state agencies proposing rules that will require the expenditure of public funds in excess of \$100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two years immediately following adoption of the rules.

15. The proposed rules would require the Department to “provide auxiliary aids and services for effective communication necessary to enable an applicant or eligible consumer to access division services” but would preclude the Department from “assum[ing] the responsibility of other programs or vendors, such as postsecondary training institutions, community rehabilitation programs, physicians, psychologists, and placement agencies, for providing program and service accessibility” under regulations promulgated under the federal Americans with Disabilities Act (hereinafter referred to as the “ADA”). In the past, the Department has contributed to the cost of such services. Transcript at 18. Thus, under the approach taken in the proposed rules, the Department expects that sign language interpreters and other auxiliary aids and services will be provided by public entities and public accommodations under the ADA rather than by the Department.

16. Several individuals, including Raymond C. Olson, Dean of St. Paul Technical College, Patrick Duggan, a Counselor in the Program for Deaf Students at St. Paul Technical College, Rachel Hanson, Director of the Office for Students with Disabilities at Fond du Lac Tribal Community College, and Daniel Burns, Special Needs Supervisor of Riverland Technical College in Faribault, asserted that, by removing the Department’s financial support, the proposed rules in effect require postsecondary institutions to make additional expenditures of public funds. These commentators pointed out that the average cost for an interpreter in the Technical College system is \$26,000 and estimated that the total cost for interpreter services in the merged Technical College/Community College/State University system would be \$1.5 million in 1995-96. They asserted that the Department now provides \$1500-\$1800 per quarter or semester for students who need such services in the Community College and State University systems. The Department maintains that the obligation to spend public funds arises from the ADA and not from the proposed rules themselves.

17. Minn. Stat. § 14.11, subd. 1 (1992), contemplates that an agency will be required to provide a fiscal notice when its proposed rules will require the outlay of funds by local public bodies. The term “local public bodies” is defined in the statute to

mean “officers and governing bodies of the political subdivisions of the state and other officers and bodies of less than statewide jurisdiction which have the authority to levy taxes.” In this instance, it is evident that postsecondary institutions do not constitute “local public bodies” within the meaning of the statute. Accordingly, the Department was not required to prepare a fiscal notice regarding the proposed rules.

Impact on Agricultural Land

18. Minn. Stat. § 14.11, subd. 2 (1992), requires that agencies proposing rules that have a “direct and substantial adverse impact on agricultural land in the state” comply with the requirements set forth in Minn. Stat. § 17.80 to 17.84 (1992). Because the proposed rules will not have a direct and substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1992), these statutory provisions do not apply.

Analysis of the Proposed Rules

19. The Administrative Law Judge must determine, *inter alia*, whether the need for and reasonableness of the proposed rules has been established by the Department by an affirmative presentation of fact. The Department prepared a Statement of Need and Reasonableness (“SONAR”) in support of the adoption of each of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for each provision. The SONAR was supplemented by the comments made by the Department at the public hearing and in its written post-hearing comments.

20. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985); Blocher Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.” Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards as long as the choice it makes is rational. If commentators suggest approaches other than that selected by the agency, it is not the proper role of the Administrative Law Judge to determine which alternative presents the “best” approach.

21. Several of the comments related to portions of the Department’s existing rules that were not proposed for modification in this proceeding. Although the Department has the benefit of those remarks for consideration in future rulemaking proceedings, they are not pertinent to the rules under consideration in the current proceeding and thus will not be discussed in this Report.

22. This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Accordingly, the Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion has been carefully read and considered. Because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of the provisions of the rules that are not discussed in this Report by an affirmative presentation of facts, that such provisions are specifically authorized by statute, and that there are no other problems that prevent their adoption.

23. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from the language that was originally proposed. Minn. Stat. § 14.15, subd. 4 (1992). The standards to determine if the new language is substantially different are found in Minn. Rules pt. 1400.1100 (1993). Any language proposed by the Department which differs from the rules as published in the State Register which is not discussed in this Report is found not to constitute a substantial change.

Proposed Rule Part 3300.5010 - Definitions

24. In this rulemaking proceeding, the Department is proposing to amend Minn. Rules pt. 3300.5010 by repealing the definition of "restoration services" and adding or modifying definitions of "auxiliary aids and services for effective communication," "paratransit," "physical and mental restoration services," "public entity," "transportation services," and "tuition cap." As explained above, this Report will discuss only those definitions that received significant comment or otherwise require discussion. The remaining definitions are adequately supported by the Department's SONAR and have been shown to be needed and reasonable.

Subpart 3a - Auxiliary Aids and Services for Effective Communication

25. Proposed subpart 3a defines "auxiliary aids and services for effective communication" as having the meaning given "auxiliary aids and services" in federal regulations promulgated under the ADA. See 28 C.F.R. §§ 35.104 and 36.303(b). Prior to the hearing, the Minnesota Disability Law Center/Client Assistance Project (hereinafter referred to as "MDLC") and Julie Zimmer of the Star Program requested clarification regarding the services that would be deemed to fall under the proposed definition. In particular, these commentators suggested that the Department consider augmentative communication devices as being included in the definition.

26. At the hearing, the Department noted for the record that it agreed that such devices fall under the definition of "auxiliary aids and services" set forth in the federal ADA regulations referenced in the proposed rule. The Department pointed out that treatment of augmentative communication devices as auxiliary aids and services would

be consistent with the analysis reflected in the ADA Handbook published by the U.S. Department of Justice and the Equal Employment Opportunity Commission. Transcript at 16-17. The MDLC and the Star Program expressed appreciation at the hearing for the Department's clarification of its position regarding the treatment to be accorded augmentative communication devices. The Department has shown that it is needed and reasonable to define "auxiliary aids and services for effective communication" in subpart 3a in a manner consistent with the definition promulgated under the ADA..

Subpart 43 - Transportation Services

27. The proposed rules modify subpart 43 to clarify what payments are to be included within "transportation services." As proposed, the rules replace the reference to "public transportation" with "transportation provided by a public entity," delete the reference contained in the current rules to the purchase of vehicle adaptations (in order to clarify that vehicle adaptations are considered to be rehabilitation technology rather than transportation services), include payments for a driver if one is required, and add a reference to "other available transportation if transportation provided by a public entity, including paratransit, and transportation by private vehicle are unavailable."

28. The inclusion of reimbursement for private drivers was made in response to comments submitted by Kathleen Cargill of the College of St. Scholastica during the period of time in which outside opinion was provided to the Department and arises from the experience the Department has had with the existing rule language. These modifications serve to clarify the meaning of "transportation services" in the rules. No one objected to the proposed definition. The Department has demonstrated that subpart 43, as proposed, is needed and reasonable to define "transportation services" and meet the needs of Department consumers.

Subpart 44 - Tuition Cap

29. Subpart 44, item A of the existing rules sets a tuition cap for postsecondary training programs leading to a bachelor's or higher degree in an amount equal to the average annual cost of tuition and mandatory fees needed for a student to complete 45 credits in three quarters at the University of Minnesota-Morris. Item B of the existing rules establishes a tuition cap for all other undergraduate programs in an amount equal to the average annual cost of tuition and mandatory fees needed for a student to complete 45 credits in three quarters at a state community college. In the proposed rules, the Department seeks to modify item B to refer to 60 credits in twelve consecutive months rather than 45 credits in three quarters. The Department is making this change in response to the experience of its clients that current 45 credit cap is inadequate because several training programs require students to take up to 60 credits and attend for three quarters plus a summer session. The tuition and fees for such training programs can exceed the tuition cap set forth in the existing rules. No one objected to this provision of the proposed rules. Subpart 44, as proposed, has been shown to be needed and reasonable to adequately cover the tuition and fees of eligible consumers attending community and technical colleges.

Proposed Rule Part 3300.5040 - Consumer Financial Participation in Cost of Vocational Rehabilitation Services

30. The Department seeks to modify subpart 6 of Minn. Rules pt. 3300.5040 by adding "auxiliary aids and services for effective communication" to the list of services that are exempt from financial participation by eligible consumers. Under the existing rules, consumers with gross family incomes higher than the Minnesota median income as adjusted for family size must pay for some purchased vocational rehabilitation services in an amount equal to the percentage by which their gross family income exceeds the adjusted median income.

31. In its SONAR, the Department explained that it has proposed to exempt interpreters, notetakers, readers, and other "auxiliary aids and services for effective communication" from the consumer financial participation requirement in order to conform to federal regulations implementing the ADA. The federal regulations specify that "a public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the [ADA] or [the federal regulations]." 28 C.F.R. 35.130(f). "Auxiliary aids" are defined in the federal regulations to include qualified interpreters, notetakers, readers, Brailled materials, and other similar services and actions. 28 C.F.R. 35.104, 36.303. "Public accommodations" are also required under the regulations to provide auxiliary aids and services and are prohibited from imposing a surcharge on an individual or group of individuals to recoup the cost of such services. 28 C.F.R. 36.104, 36.301. This provision of the proposed rules was supported by Sharaine Rice, Executive Director of the Minnesota Foundation for Better Hearing and Speech, representing the Department's Deaf and Hard of Hearing Services Advisory Committee, and Curt Micka, Director of the Minnesota Commission Serving Deaf & Hard of Hearing People. Part 3300.5040 of the proposed rules has been shown to be needed and reasonable to ensure that the Department's approach is in compliance with the ADA regulations.

Proposed Rule 3300.5050 - Comparable Benefits and Services

32. The Department is proposing to modify item C of subpart 2 in Minn. Rule 3300.5050 by adding "physical and mental" to the existing term "restoration services." The Department explained that the change is intended to conform the rule language to the terminology used in the federal Rehabilitation Act and regulations promulgated thereunder. SONAR at 12. The proposed rule does not seek to make any change in the responsibilities of consumers. Part 3300.5050 has been shown to be needed and reasonable to achieve consistency with federal law and regulations.

Proposed Rule Part 3300.5060 - Terms and Conditions for Provision of Vocational Rehabilitation Services

33. Minnesota Rule 3300.5060 is comprised of 13 subparts. The Department proposes to repeal four subparts, add three subparts, and modify five subparts. The new land modified subparts that received significant public comment will be discussed below.

Subpart 1a - Auxiliary Aids and Services for Effective Communication

34. Subpart 1a requires the Department to provide the auxiliary aids and services needed to enable an applicant or eligible consumer to access services provided by the Department, but precludes the Department from assuming the responsibility of other programs or vendors to provide program and service accessibility under 28 C.F.R. 35.149 -35.164 and 36.301-36.310. In the past, the Department has contributed to the cost of sign language interpreters and other auxiliary aids and services at certain postsecondary training institutions and other entities. In its SONAR, the Department contends that, pursuant to ADA regulations it is now clear that public entities and public accommodations have the responsibility for providing auxiliary aids and services in order to ensure that individuals with disabilities have access to the programs and services of the public entity or public accommodation. In the event that a determination was made that it would be an undue hardship for the public entity or public accommodation to provide the requested auxiliary aid or service, the Department could choose to pay for the requested accommodation. Transcript at 81.

35. Several commentators, including Raymond C. Olson, Patrick Duggan, Rachel Hanson, and Daniel Burns asserted that the rule was unreasonable because it removes the Department's financial support and increases expenditures required of postsecondary institutions. Dean Olson emphasized that schools such as the St. Paul Technical College are unable to act on an individual basis to raise tuition levels to support payment for interpreter services, in contrast to specialized schools, such as Gallaudet University, where the general tuition may be adjusted to cover those costs. He also objected to the proposed rule because it appears to preclude Departmental contributions to the cost of services used primarily by deaf and hard of hearing students while providing payment for several types of services that benefit individuals with other disabilities. He urged the Department to wait for clarification from the U.S. Department of Justice regarding this issue before adopting the proposed rule. MDLC asserted that the proposed rule could place consumers in the middle of a struggle between the Department and postsecondary institutions regarding the provision of interpreter and other services that may be needed. The Star Program urged the Department to pay for the service and then seek reimbursement from the responsible entity. The Minnesota Commission Serving Deaf and Hard of Hearing People supported the rule, asserting that funds currently spent on providing auxiliary aids to clients attending schools could be better spent in assisting clients or potential clients outside of postsecondary institutions who are involved in more direct rehabilitation services programs.

36. The Department responded that federal regulations and positions taken by the U.S. Department of Justice in litigation involving Harcourt Brace Legal Publications and the Becker CPA Review have made it clear that it is the view of the Department of

Justice that postsecondary training programs, not state vocational rehabilitation agencies, are responsible for providing auxiliary aids and services to students. The Department also pointed out that, while federal interpretations of the ADA have approved population-wide increases in cost to cover interpreter services or other rehabilitative aids, they have disapproved the use of fees that are levied only against the particular consumers of services. Thus, Gallaudet's system of imposing higher tuition on the entire student body is not contrary to the ADA regulations since all students are similarly affected by the charge regardless of their need for services. The Department emphasizes that public institutions are bound to make reasonable accommodations under the ADA despite the fact that they may face a difficult situation if they do not control their own tuition charges. The Department declined to propose a rule change indicating that the Department will pay for services and then request reimbursement for them. The Department explained in its post-hearing comments that it had decided against such an approach due to legal constraints on the ability of most state agencies and other public programs to pay for services that have been already been provided and paid for by other sources, the Department's inability to unilaterally require another agency to pay for goods or services purchased by the Department, the Department's belief that it would not be prudent to spend its limited funds on lawsuits to obtain reimbursement, and the directive contained in section 101(a)(8) of the Rehabilitation Act that, with certain exceptions, vocational rehabilitation services must be provided "after a determination that comparable services and benefits are not available under any other program." (Emphasis added.)

37. The Department is statutorily authorized to implement programs providing vocational rehabilitation services to persons with disabilities. The general standards for those programs are within the policymaking discretion of the agency. See, e.g., Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 233 (1943) (agency action will be upheld if the agency acts within the statutory bounds of its authority and the choice it makes among possible alternative standards is one that a rational person could have made); Pitts v. Perluss, 27 Cal. Rptr. 19, 377 P.2d 83, 89, 58 Cal.2d 824 (1962) (in determining whether an agency has acted arbitrarily or capriciously, court must not substitute its judgment for that of the agency or consider whether it would have adopted some other approach). In articulating its policy judgment, the Department has explained that it is relying on interpretations of the ADA and has further shown how those interpretations connect rationally with its choice of the approach to be taken. While some situations may result in a dispute between the Department and the public entity or public accommodation regarding who is obligated to pay for a particular service, this fact does not render the Department's refusal to volunteer to make payments to defray the cost of auxiliary services an unreasonable choice. Substantial funds have been spent by the Department providing aids and services that are the legal obligation of others under the ADA. Subpart 1a has been shown to be a needed and reasonable approach to preserve the limited funds available to the Department for the benefit of the Department's consumers and recognize the responsibility fixed by federal law.

38. Following the hearing, the Department modified subpart 1a in response to comments made by Roseann Eshbach of MDLC. As modified, the subpart provides

that “[t]he division must provide auxiliary aids and services for effective communication necessary to enable an applicant or eligible consumer to access division services or participate in vocational rehabilitation services under an individualized written rehabilitation program, except that the division must not assume the responsibility of other programs or vendors” (New language is underlined.) The modification clarifies that the Department will provide auxiliary aids and services for effective communication when necessary for an individual’s participation in vocational rehabilitation services under an IWRP. The modification does not render the rule substantially different from the rule as originally proposed, and is needed and reasonable to clarify the scope of the rule.

Subpart 3a - Durable Medical Equipment

39. Subpart 3a sets forth new terms and conditions for the provision by the Department of durable medical equipment. The proposed rule requires that the amount of the consumer’s financial participation in the cost of durable medical equipment be determined under part 3300.5040 before the Department provides such equipment. The subpart also requires the consumer to cooperate with the Department in searching for comparable benefits except where such a search would cause the loss of an immediate job placement. In its SONAR, the Department indicated that these changes were proposed in response to concerns raised by counselors and consumers that the current rule’s treatment of durable medical equipment under the terms and conditions applicable to restoration services was too restrictive. The current rule states that the Department will not pay for “restoration services that an eligible consumer would require regardless of participation in an individualized written rehabilitation program.” Because, in certain situations, durable medical equipment is necessary for a consumer to participate in an IWRP and also is necessary if the consumer was not participating in vocational rehabilitation services, the Department deemed it necessary to modify the rule to delete that requirement. While consumers are required to assist in the search for comparable benefits, the proposed rule does not require that consumers make a claim with their health insurer or apply for Medical Assistance because the Department recognizes that private insurance and Medical Assistance do not cover every type of durable medical equipment.

40. Roseann S. Eshbach of MDLC and Julie Zimmer of the Star Program asserted that some pieces of durable medical equipment could be considered “rehabilitation technology,” and thus would properly be exempt from the comparable benefits requirement. MDLC suggested that the rules be changed to specifically exclude items that would otherwise be considered rehabilitation technology from the comparable benefit search. The Star Program suggested that the definitions be made clearer in order to aid consumers in determining the proper treatment of a particular piece of equipment.

41. The Department acknowledged in its post-hearing comments that, pursuant to the provisions of the Rehabilitation Act, rehabilitation technology is not subject to a comparable benefit search while durable medical equipment is subject to such a search. Department's May 9, 1995, Comment at 11. The definition of "rehabilitation technology" as set forth in Minn. Rule 3300.5010, subpart 37, includes technology used to eliminate barriers confronted by eligible consumers. "Durable medical equipment" is defined in Minn. Rules pt. 3300.5010, subpart 8 to include mobility aids and other nonconsumable equipment whose primary purpose is to enable an individual to perform life functions that would otherwise not be possible for the person to perform due to physical or mental impairment. The definitions relating to both of these types of equipment are in current rule and thus have previously been found to be needed and reasonable. Neither these definitions nor the pertinent provisions of the comparable benefits rule provision (Minn. Rules pt. 3300.5050) are proposed for amendment in this rulemaking proceeding. The treatment accorded durable medical equipment in subpart 3a has been shown to be needed and reasonable. As written, the proposed rules are not in conflict with either the Rehabilitation Act or the ADA. Any disputes regarding the proper categorization of an item of equipment as "durable medical equipment" or "rehabilitation technology" must await resolution in a different forum.

Subpart 7a - Physical and Mental Restoration Services

42. As proposed, subpart 7a allows consumers to select any "licensed physician" to perform physical restoration services. The MDLC suggested that the proposed rules be modified to permit the selection of "any licensed physician, physician assistant, or nurse practitioner" to perform such services. The Department did not modify the rule provision or otherwise specifically respond to this suggestion in its post-hearing comments. In its SONAR, the Department indicated that the rule language parallels existing provisions permitting consumer choice of licensed physicians and dentists and vendors of braces or artificial limbs. Moreover, it is evident that the language at issue is included verbatim in the existing rule and has simply been moved to subpart 7a. (See Minn. Rules pt. 3300.5060, subp. 10(D)(1). The need for and reasonableness of this rule provision thus has been demonstrated in a prior rulemaking proceeding. The Department has demonstrated that subpart 7a is needed and reasonable to clarify that both physical and mental restoration services are encompassed and to permit consumers to choose their service providers. The proposed rule is not rendered unreasonable by its failure to include the suggested language.

Subpart 9 - Rehabilitation Technology

43. Item A of subpart 9 of the existing rules requires that the amount of consumer financial participation be determined before the Department provides rehabilitation technology. In this rulemaking proceeding, the Department seeks to modify item A to exempt from the consumer financial participation requirement items that are also auxiliary aids and services for effective communication. This new language is consistent with the treatment of auxiliary aids and services throughout these rules and

was supported by the MDLC and several other commentators. Item A has been shown to be needed and reasonable as proposed.

44. In item C of subpart 9, the Department seeks to add new language setting out a procedure under which the Department will purchase vehicle adaptations for consumers. The first three subitems, providing for evaluation of the vehicle and consumer's needs; requiring the purchase to be consistent with the evaluation; and prohibiting the Department from considering the availability of transportation provided by a public entity, paratransit, or carpooling in determining whether to provide vehicle adaptations, were not controversial and in large part were merely moved to this new rule part from other locations in the existing rules. See Minn. Rules pt. 3300.5060, subp. 12(H). The last subitem, subitem 4, provides that the Department "must only purchase vehicle adaptations that have not been previously owned and that are not yet installed in the consumer's vehicle at the time of purchase of the vehicle." The Department emphasized during the hearing and in its post-hearing comments that the proposed rule is limited to vehicle adaptations and does not apply to all equipment purchases.

45. Roseann Eshbah of MDLC, Rachel Parker of PACER, Jeff Bangsberg of the State Rehabilitation Advisory Council, and Julie Zimmer of the STAR Program urged the Department to allow used equipment to be purchased because it is less expensive than new equipment and urged the use of disclaimers to avoid difficulties with the lack of a warranty. In its SONAR and post-hearing comments, the Department indicated that the provision was reasonable and necessary for quality consumer service and to assure that vehicle adaptations meet the special needs of the consumer. The Department pointed out that new equipment or adaptations would be under warranty and in good condition, while that would not always be true of used equipment. The Department further stated that requiring the purchase of new equipment would enable the Department to more clearly track bids and expenditures in order to ensure that the Department was not contributing to the purchase of the vehicle itself. The Department pointed out that used equipment may be of questionable condition and may pose liability issues if an equipment failure on a vehicle occurs. The Department also indicated that it was concerned about the expense involved in removing equipment from one vehicle and installing it on another, the risk of damaging the equipment during the removal process, and the availability of parts for older used equipment. The Department has raised legitimate concerns which support the need and reasonableness of the proposed rule. Item C has been shown to be needed and reasonable as proposed.

Subpart 11 - Small Business Enterprises

46. Subpart 11 sets out the terms and conditions under which the Department will provide financial assistance in the establishment of small business enterprises by consumers. The Department proposes to modify Item A of the existing rules to limit Department purchases to "occupational licenses, tools, equipment, and initial stocks and supplies." The current rule provides that the Department will purchase "goods and

services.” New language contained in item C of the proposed rules reiterates that “[d]ivision assistance in the establishment of a small business enterprise is for the purchase of occupational licenses, tools, equipment, and initial stocks and supplies.” Conforming changes are also made to proposed items D, E, F, and G of the subpart.

47. Luther Granquist and Roseann Eshbach of the MDLC, Julie Zimmer of the STAR Program, and Scott Wenger objected to the elimination of language indicating the Department will purchase services to assist in establishing a small business enterprise. These commentators suggested that accounting services, insurance, rent, computer consulting services, legal advice, and advertising are essential to establishing a small business. The commentators maintain that the Department has not shown that it is necessary or reasonable to exclude payment for goods and services.

48. In its SONAR, the Department states that it proposes replacing the phrase “goods and services” with “occupational licenses, tools, equipment, and initial stocks and supplies” to achieve consistency with the language of the Rehabilitation Act and regulations promulgated thereunder. The Department emphasizes that 34 C.F.R. § 361.42(14) lists among the vocational rehabilitation services that must be provided “[o]ccupational licenses, including any license, permit or other written authority required by a State, city or other governmental unit to be obtained in order to enter an occupation or to enter a small business, tools, equipment, initial stocks (including livestock) and supplies. The Department points out that “other services, if necessary, may be provided as part of an [IWRP] to assist a DRS consumer to reach an employment goal prior to the establishment of a small business enterprise,” such as counseling in the selection of an employment goal, training to learn necessary skills, and other services depending on individual needs. At the hearing, the Department expressed its view that training of consumers could encompass several of the service areas discussed by commentators, distinguished between the provision of initial costs and on-going costs, and stated that providing services until a business was viable did not seem to be a prudent use of funds.

49. In its written comments, the MDLC cites the Rehabilitation Act as requiring that the Department provide “any goods and services necessary to render an individual employable.” MDLC Comment at 1 (citing 29 U.S.C. § 723(a)(9)). The statement in the Department’s SONAR is criticized by MDLC for not explaining why services are being deleted. In its post-hearing comments, the Department responded to this criticism and expressly stated that the Rehabilitation Act and federal regulations do not treat these types of small business set-up services as required vocational rehabilitation services. In the Department’s view, the regulations’ reference to payment of “occupational licenses, tools, equipment, and initial stocks and supplies” (emphasis supplied) carries with it the clear implication that the it would not be appropriate “for public vocational rehabilitation funds to be used to subsidize the ongoing operations of a small business in competition with other businesses which do not receive services purchased by public vocational rehabilitation funds.” Department’s May 9, 1995, Comment at 13-14.

50. As further support for the proposed rule, the Department contends that it is appropriate to view the obligation under the Rehabilitation Act to provide “any goods and services necessary to render an individual employable” within the context of the State’s rulemaking authority under Minnesota statutes and the authority granted by the Rehabilitation Act and the federal regulations under the Act to the individual states to determine the scope and nature of the goods and services they will provide and the terms and conditions for the provision of those goods and service. Department’s May 9, 1995, Comment at 13.

51. With the exception of rent and advertising, the types of services suggested by the commentators could be performed by the consumer after the receipt of appropriate training. A consumer wishing to operate a small business may have to carry out some of these tasks until the business generates enough income to afford the consumer to hire outside help. Rent and advertising costs raise a different issue. Depending on the type of business the client seeks to initiate, the costs for rent and advertising could range from minimal to significant. The problem identified by the Department regarding the improper expenditure of funds to underwrite the ongoing operation of a small business is most acute with respect to these costs. These services do not come within the types of services for which payment is required under the Rehabilitation Act.

52. It is necessary and reasonable for the Department to ensure that its payments are made for the types of goods and services required by the Rehabilitation Act while, at the same time, exercising its discretion to make choices regarding the appropriate use of limited public resources. The focus of the Rehabilitation Act is “employability.” The efforts of the Department are directed toward consumers receiving the assistance they need to join the workforce in capacities consistent with their abilities. As discussed above, the Department has statutory authority to implement programs providing vocational rehabilitation services to persons with disabilities, and the general standards for those programs are within the policymaking discretion of the agency. See, e.g., Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 233 (1943) (agency action will be upheld if the agency acts within the statutory bounds of its authority and the choice it makes among possible alternative standards is one that a rational person could have made); Pitts v. Perluss, 27 Cal. Rptr. 19, 377 P.2d 83, 89, 58 Cal.2d 824 (1962) (in determining whether an agency has acted arbitrarily or capriciously, court must not substitute its judgment for that of the agency or consider whether it would have adopted some other approach). In articulating its policy judgment, the Department has explained its interpretation of federal requirements and has shown how its interpretation connects rationally with its choice of the approach to be taken. The Department has identified legitimate reasons to modify the existing rule to replace “goods and services” with “occupational licenses, tools, equipment, and initial stocks and supplies.” Subpart 11 of the proposed rules has been shown to be needed and reasonable.

Subpart 13 - Tuition, Fees, Books, Supplies, and Tools and Equipment for Postsecondary Training

53. Subpart 13G of the proposed rules specifies that the tuition cap will not be applied by the Department in determining the amount of Departmental payments for tuition, fees, books, supplies, and tools and equipment for postsecondary training when the consumer's IWRP includes attendance at Gallaudet University of National Technical Institute for the Deaf. In its SONAR, the Department explained that these institutions offer unique educational and training experiences that are not limited to the provision of sign language interpreters and indicated that it would be inappropriate to apply the tuition cap to them. Several commentators, including Sharaine Rice of the Deaf and Hard of Hearing Services Advisory Committee, Curt Micka of the Minnesota Commission Serving Deaf and Hard of Hearing People, and Everett W. Chard, Vice Chair of the Advisory Committee for Services to Deaf and Hard of Hearing People, supported the proposed rule. Carol Udstrand of Minneapolis Community College questioned why other institutions specializing in the provision of education to persons with disabilities were not included. The Department indicated that Gallaudet University and NTID were chosen because they are the only schools to the Department's knowledge that are federally funded specifically to provide this unique educational environment. Subpart 13G has been shown to be needed and reasonable, as proposed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Economic Security ("the Department") gave proper notice of this rulemaking hearing.
2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2 (1992), and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.
3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii) (1992).
4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii) (1992).
5. The additions or amendments to the proposed rules suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State

Register within the meaning of Minn. Stat. § 14.15, subd. 3 (1992), and Minn. Rules pts. 1400.1000, subp. 1 and 1400.1100 (1993).

6. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this _____ day of June, 1995.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Transcript Prepared (One Volume)
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